United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

77-7114

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOSEPH BULLA, ANNY ALTMAN, NATALIE WARTENBERG, SIGMUND RINGER, DORA GOLDMAN, ANNE MORRIS, TERESA TALIERCIO and DOROTHY NIEMIEC, on behalf of themselves and all other persons similarly situated,

Appellants,

- against -

PHILIP L. TOIA, as Commissioner of Social Services of the State of New York;
ROBERT P. WHALEN, as Commissioner of Health of the State of New York;
PETER GOLDMARK, as Director of the Budget of the State of New York; and
HUGH L. CAREY, as Governor of the State of New York,

Appellees.

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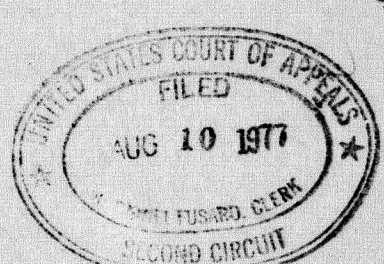

PETITION FOR REHEARING WITH

SUGGESTION FOR REHEARING *IN BANC*

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UNITED STATES COURT OF APPEALS

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JOSEPH BULLA, ANNY ALTMAN, NATALIE WARTENBERG, SIGMUND RINGER, DORA GOLDMAN, ANNE MORRIS, TERESA TALIERCIO and DOROTHY NIEMITZ, on behalf of themselves and all other persons similarly situated,

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Appellees.

PETITION FOR REHEARING WITH

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TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT:

Appellants respectfully submit this petition for rehearing and suggestion for rehearing *in banc* pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure.

The decision herein (per Anderson, C.J. and Mulligan, C.J.) dismissing appellants' appeal misapprehends the facts of the case, the law applicable in this circuit and the consequences of the decision rendered below.

Appellants are recipients of Medical Assistance (Medicaid) residing in nursing homes in the State of New York. This action was initiated by the named appellants on their own behalf and on behalf of all nursing home patients in New York whose nursing care and services have been reduced by the actions of the appellees.

In their action below appellants sought injunctive and declaratory relief to redress violations of rights secured to them by the due process clause of the Fourteenth Amendment to the Constitution of the United States; by Title XIX of the Social Security Act, 42 U.S.C. §1396 *et seq.*, and certain regulations promulgated thereunder; by the Civil Rights Act of 1871, 42 U.S.C. §1983; by New York State Social Services Law and certain regulations promulgated thereunder; and the New York State Health Code.

Appellants are suffering reductions in the Medical Assistance and are threatened with further reductions affecting their nursing care and services. Appellants alleged that their rights have been violated by appellees'

actions reducing their Medical Assistance without giving them timely and adequate notice and an opportunity to contest any proposed reduction in their Medical Assistance, and without consultation with and participation of the Medical Care Advisory Committee established as part of the Medicaid program all specifically required by the Medicaid Act and regulations. Appellants' rights have also been violated by appellees' promulgation of a system of reimbursing nursing homes for appellants' care which is arbitrary, capricious, and unreasonable; which is not sufficient to allow for adequate nursing care; which is not reasonably related to the cost of appellants' care; which violates appellants' rights under a contract between the nursing homes in which they reside and the appellees; and which is not designed to enlist participation of providers of nursing home care in the Medical Assistance program.

The refusal to hear this appeal contracts the jurisdiction of this Court. Hereafter there will be a category of orders denying preliminary injunctions which are not appealable under 1292(a)(1), e.g., those denying injunctions to class plaintiffs. 28 U.S.C. 1292(a)(1) makes no distinction between the type of orders refusing injunctions which are appealable. That section does not provide that denials of injunctions to

individuals are appealable while denials to classes are not. The decision of this Court draws that unwarranted distinction. It is particularly unfortunate without appellants having had an opportunity to brief or argue the question of appealability.

As this Court itself noted in the opinion, "Congress provided for interlocutory appeals from the orders specified in §1292(a)(1) 'to permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable consequences'" quoting Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176 at 181.

Unfortunately the court misapprehends the effect of the lower court order when it declares that the denial of the preliminary injunction to the class "delays the grant of such relief" but does not "produce the type of irreparable consequences that were meant to be encompassed within the interlocutory orders appealable under §1292 (a)(1)." Slip Op. 4970.

It appears that the court focussed only on the circumstances of the companion case, New York Association of Homes for the Aging v. Toia. In note 2, Slip Op. p.4962, the court notes that "the nursing home class members that are not nominal plaintiffs apparently have been kept fully informed of the proceedings in this action". And in note 7, Slip Op. p. 4969, the court notes that "(e)ach nursing home can still have the merits of

its motion for a preliminary injunction tried before the district court with the prospect of securing on an individual basis the same relief..."

The members of the plaintiff class in this case are not in the same circumstances. The gravamen of appellants' complaint in this case is that the appellees have reduced their public assistance benefits without providing the notice and opportunity for a hearing which are unquestionably required by law. The members of the class of plaintiffs not named in the complaint are still ignorant of the cause of their plight and the remedies available to them.

During the course of argument before the district court, appellants' counsel requested permission to contact the members of the class to notify them of the pendency of the lawsuit and the court's offer to hear individual requests for preliminary relief. Counsel's request was denied. Thus the reality of this case is that the residents of New York's nursing homes are in the dark concerning their legal rights and unable to individually apply for relief. Even were the individual class members somehow aware of the available remedy, the history of this litigation shows that the procedure adopted by the lower court forecloses the possibility of obtaining the relief needed.

Plaintiffs claim that the institution of the present system of reimbursement denies them adequate nursing care. In support of the claim for a preliminary injunction plaintiffs assert that such relief is necessary to prevent injury prior

to the final determination of this case. The likelihood of this injury occurring is not speculative. Appellants, helpless residents of nursing homes, are by definition unable to care for themselves or live without nursing care. Any reduction of that care "threatens" irreparable injury. Jacobson & Co. v. Armstrong Cork Co., 548 F.2d 438, 441 n.2 (2d Cir. 1977); Triebwasser & Katz v. American Tel. & Tel. Co. 535 F.2d 1356, 1359 (2d Cir. 1976).

The likelihood of injury was not seriously in doubt below. After hearing evidence of the deteriorating condition of patients at Beth Abraham Hospital, Judge Griesa himself acknowledged the "suffering that I am already sure they [Beth Abraham patients] are going through." (JA-2209, emphasis supplied)* Deputy Commissioner Davidoff admitted that the "dilemmas" faced at Beth Abraham were "faced in each of these cases," (JA-2180) and not unique.

Insofar as the appellants have been denied their constitutional right to due process of law, no further showing of irreparable injury is necessary to sustain a preliminary injunction. Wright and Miller §2948, Battle v. Municipal Housing Authority of Yonkers, 53 FRD 423 (SDNY 1971); Collis v. N.Y. State Department of Soc. Serv. 332 F. Supp. 473 (SDNY 1970); Fortune Society v. McGinnis 319 F. Supp. 901 (SDNY 1970); Brass v. Hoberman 295 F. Supp. 358 (SDNY 1968).

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* JA refers to the joint appendix on appeal.

Appellants have already been subjected to decreases in their public assistance benefits without notice or an opportunity for a hearing to contest the decreases. The decreases have already resulted in cuts in nursing care and medical services rendered appellants. There is a continuing violation of appellants' constitutional rights. An injunction issued in the future to terminate the violation cannot rectify the loss of constitutional rights or restore appellants' health or lives.

Thus, the refusal of preliminary relief to the class does contract "the scope of ultimate injunctive relief...to the extent of effectively 'denying' the relief plaintiffs seek," Williams v. Wallace Silversmiths, Inc., _____F.2d_____ (2d Cir. March 4, 1977), Slip Op. at 2188, 13 E.P.D. ¶11,556 at p.7000, the protection of their present state of health. Plaintiffs are not businessmen who arrange loans to cover temporary financial loss. They cannot borrow against time. Contrary to the unfortunate assertion of the decision rendered here, the delay caused by the ruling below will result in irreparable consequences for many plaintiffs. The touchstone of a request for preliminary injunctive relief is immediate need--delay is denial.

Appellants assert that this Court erred by not considering facts before it relating to the size and nature of the class, the lower court's refusal to allow counsel to advise individual class members of the pendency of the action, the time required for the relief procedure established, and the evidence of irreparable harm adduced.

The reasoning of the court below that the degree of cuts varies from home to home overlooked that the relief requested by appellants is precisely tailored to variation in the size of cuts. All appellants sought was return to the situation as of October, 1976. The larger the cut in Medicaid benefits for a patient, the larger the restoration *pendente lite*. The underlying balance of hardship between appellants and appellees would remain constant.

The State-required reductions in care and other facts in this case point clearly to irreparable consequences so grave it is hard to understand the court's assertion that they are not the "type...meant to be encompassed within appealable orders." Slip Op. at 4970.

Appellants respectfully assert that this Court misapprehended the law applicable to the issue of appealability in this case. In Williams v. Wallace Silversmiths, Inc., *supra* at Slip Op. 2181, this Court held that an order denying class certification was not appealable under 28 U.S.C. §1292(a)(1) even though class-based injunctive relief was sought in the complaint. The ruling there appealed from specifically dealt with the propriety of proceeding on a class basis and raised no issue of preliminary injunctive relief--none had been requested. This Court stated the purpose of allowing interlocutory appeals to permit "immediate review of orders granting or denying preliminary (interlocutory) injunctions." Id., 13 E.P.D. at 6999. In that case the denial of class certification did not contract the scope of ultimate injunctive relief available so as to deny the remedy plaintiffs sought.

Slip Op. at 2188, 13 E.P.D. at 7000. That determination was undoubtably based on the conclusion that "injunctive relief is not the heart of the complaint. Plaintiffs claim damages of $500,000." 13 E.P.D. at 7000.

In Build of Buffalo v. Sedita, 441 F.2d 284 (2d Cir. 1971), this Court held that a dismissal as to several defendants in a Title VII action was appealable under 28 U.S.C. §1292(a)(1). "[B]y granting the motion...to dismiss, the district court effectively denied at the same time plaintiffs' motion for a preliminary injunction against those defendants. The resultant denial of an injunction is appealable under 28 U.S.C. §1292(a)(1)." 44; F.2d at 286.

Significant characteristics distinguished Williams from Build of Buffalo: in Williams no preliminary relief was sought; the striking of the class allegations in Williams was not based on a view of the merits of plaintiffs' case or any other legal barrier; and the scope of ultimate injunctive relief was not contracted to the extent of effectively denying the relief sought. 13 E.P.D. at 7000.

The present case is obviously akin to Build of Buffalo and distinguishable from Williams. First, appellants here did request preliminary injunctive relief--that motion, not the motion for class certification, was denied. It is not necessary to construe denial of injunctive relief. Second, the denial of preliminary relief was based on Judge Griesa's opinion that he lacked legal authority to grant such relief. Finally, the essence of appellants' complaint is a request for injunctive relief. Appellants seek both temporary and permanent injunctions,

and the grant of a permanent injunction can in no way compensate for the injuries suffered pending the litigation.

CONCLUSION

Therefore, appellants respectfully urge this Court to rehear this appeal and suggest that, due to the need for clarification of the important issues raised in the opinion here, and the inconsistency of this decision with others in the circuit, that rehearing be by this Court *in Banc*.

Respectfully submitted,

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Attorneys for Appellants

DATED: New York, New York
August 10, 1977.

UNITED STATES COURT OF APPEALS
~~FOR THE SECOND CIRCUIT~~

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Appellants,

-against-

PHILIP L. TOIA, as Commissioner of Social Services of the State of New York, et al.,

Defendants.

AFFIDAVIT OF SERVICE BY MAIL

Index No. 77 - 7114

STATE OF NEW YORK)
SS.:
COUNTY OF NEW YORK)

ELIZABETH MELENDEZ, being duly sworn, deposes and says:

Deponent is not a party to the above action, is over 18 years of age and resides at 3 Haven Plaza, New York, New York.

That on the 10 day of August, 1977, deponent served the within PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING IN BANC

upon Louis J. Lefkowitz, Attorney General of the State of New York, 2 World Trade Center, New York, NY 10047, Attention: Charles Bradley

the address designated by said attorney for that purpose by depositing two copies of same in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the state of New York.

Elizabeth Melendez
ELIZABETH MELENDEZ

Sworn to before me this
10 day of August, 1977.

Frances M. Diaz
NOTARY PUBLIC

FRANCES M. DIAZ
Notary Public, State of New York
No. 31-4648686
Qualified in New York County
Commission Expires March 30, 1979